IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 04-____

STATE ex rel. MIKE McGRATH, Attorney General,
State of Montana,

Applicant,

v.

JUDY MARTZ, Governor, State of Montana, and
JAMES SANTORO, Chief Legal Counsel, Office of the Governor,

Respondents.

APPLICATION FOR WRIT OF PROHIBITION

The State of Montana by Attorney General Mike McGrath, pursuant to the Montana Constitution, article VI, section 4(4), Mont. Code Ann. § 3-2-202, and Mont. R. App. P. 17, applies for a writ prohibiting Governor Judy Martz and her chief legal counsel, James Santoro, from unlawfully assuming the constitutional office and rights of the Attorney General as legal officer of the State.

ISSUE PRESENTED

Whether the Governor may direct the Attorney General to intervene in litigation relating to title to State land when the Board of Land Commissioners and the Attorney General have determined that such intervention would not be in the State's best interest?

PARTIES

Applicant Mike McGrath is the duly elected Attorney General of the State of Montana, and as such is "the legal officer of the state." Mont. Const. art. VI, § 4(4). As Attorney General, he serves on the Board of Land Commissioners, which "has the authority to direct [and] control . . . school lands." Mont. Const. art. X, § 4.

Respondent Judy Martz is the duly elected Governor of the State of Montana, and as such holds "[t]he executive power" and "shall see that the laws are faithfully executed." Mont. Const. art. VI, § 4(1). Governor Martz also serves on the Board of Land Commissioners.

BACKGROUND

On October 18, 2004, the Board of Land Commissioners (hereinafter "the Board") considered a proposal for the State to intervene as a plaintiff in an action in federal court that sought to quiet title to the State's mineral interest in the submerged lands of the Tongue River, namely Fidelity Exploration & Production Company v. United States of America, et al., Cause No. CV-04-100-BLG-RWA (D. Mont.). (See Affidavit of Attorney General Mike McGrath, attached hereto as Ex. A.) Secretary of State Bob Brown, a member of the Board, moved the Board to have the State of Montana, through the Department of Natural Resources and Conservation, intervene in the Fidelity Exploration litigation to defend the State's mineral interests. (McGrath Aff., ¶ 3.) The Board rejected the proposal by a three to two

margin, with Attorney General McGrath, Superintendent of Public Instruction Linda McCulloch, and State Auditor John Morrison opposing the proposal. (Id. at ¶ 4.) Governor Judy Martz and Secretary of State Bob Brown voted in favor of the proposal. (Id.)

Despite the Board's decision not to intervene on behalf of the State, the Governor, through her counsel, filed a motion to intervene in the Fidelity Exploration case on October 22, 2004. (See State's Motion for Intervention, attached hereto as Ex. B.) The Governor's motion to intervene purports to bring the State, and not just the Governor in her official capacity, into the Fidelity Exploration litigation as a named party.

The Attorney General sent a letter on October 26, 2004, in which he informed the Governor's legal counsel that he could appear in the Fidelity Exploration litigation on behalf of the Governor to represent any interest that the Governor "may have in her official capacity." (See Oct. 26, 2004 Letter from Attorney General McGrath to James Santoro, attached hereto as Ex. C.) The Attorney General further directed Mr. Santoro to refrain from taking any action on behalf of the State or the Board in the Fidelity Exploration litigation and to file an amended pleading to clarify that Mr. Santoro did not seek to intervene in the Fidelity Exploration litigation on behalf of the State or the Board. (Id.)

The Governor responded in a letter on October 28, 2004. The Governor informed the Attorney General that she had directed her legal counsel to intervene on behalf of the State in the Fidelity Exploration litigation. (See Oct. 28, 2004 Letter from Governor Martz to Attorney General McGrath, attached hereto as Ex. D.) The Governor further directed the Attorney General to assist her legal counsel's efforts. (Id.) The Governor cited Mont. Code Ann. § 2-15-201(5) in support of her authority to direct the Attorney General to assist her legal counsel. (Id.)

AUTHORITY FOR ORIGINAL JURISDICTION

This Court possesses original jurisdiction to "issue, hear, and determine writs" as provided by law. Mont. Const. art. VII, § 2(1). An original proceeding may be "justified by circumstances of an emergency nature, as when a cause of action or a right has arisen under conditions making due consideration in the trial courts and due appeal to this court an inadequate remedy." Mont. R. App. P. 17(a). In light of these authorities, this Court exercises original jurisdiction when: (1) constitutional issues of major statewide importance are involved; (2) the case involves pure legal questions of statutory and constitutional construction; and (3) urgency and emergency factors exist making the normal appeal process inadequate. See Butte-Silver Bow Local Gov't v. State, 235 Mont. 398, 401, 768 P.2d 327 (1989). The Attorney General's Application presents all three factors.

First, the authority of the Attorney General to act as the legal officer for the State presents a constitutional issue of major statewide importance. A clearly defined authority to bring and defend lawsuits on behalf of the State, and not to do so when a lawsuit is not in the State's legal interests, proves critical to the protection of State interests in the innumerable legal controversies that the State faces. More specifically, the Fidelity Exploration litigation implicates the State's relationship and continuing legal dealings with Indian Tribes throughout the State, with statewide consequences to the State's fiscal and natural resources. See Montana Power Co. v. Pub. Service Comm'n, 214 Mont. 76, 77, 768 P.2d 842 (1984) (taking original jurisdiction over conflict between Board of Natural Resources and Conservation and the Public Service Commission).

Second, the constitutionality of the Governor's purported intervention into the Fidelity Exploration litigation on behalf of the State involves pure questions of statutory and constitutional construction. No disputed facts are at issue.

Third, the Governor's unlawful intervention into the Fidelity Exploration litigation on behalf of the State requires this Court's urgent attention to prevent irreparable harm to the State's legal position in that and other proceedings. The Attorney General could himself intervene in the Fidelity Exploration litigation to clarify that the Governor's unconstitutional intervention exceeds her constitutional authority. Such an intervention by the Attorney General would be self-defeating,

however, because it would further enmesh the State in the litigation, something the Attorney General and the Board have determined to be against the State's interests.

Moreover, such an intervention would be futile, as only this Court can address definitively the state law question of the Governor's authority to intervene on behalf of the State in federal court. Allowing the Governor to proceed on behalf of the State in that litigation without addressing the threshold issue of the Governor's authority to do so would be "singularly inappropriate," and could waste "a great deal of time and expense." State ex rel. Greely v. Water Court, 214 Mont. 143, 150, 691 P.2d 833 (1984); see also Montanans for the Coal Trust v. State, 2000 MT 13, ¶ 30 (taking original jurisdiction to avoid aggravating "prolonged litigation"); Montana Power Co., 214 Mont. at 78 (taking original jurisdiction "may also promote judicial economy"); Butte-Silver Bow Local Gov't, 235 Mont. at 402 (taking original jurisdiction when "resolution of the issues presented herein is necessary to eliminate or reduce a multiplicity of future litigation; . . . and to eliminate needless expenditure of public funds on procedures that otherwise might subsequently declared illegal."), quoting Grossman v. State, 209 Mont. 427, 432-33, 682 P.2d 1319 (1984).

In addition, this Application seeks relief that "would have the force and effect of a writ of prohibition against state officers and is, therefore, a legitimate purpose for which original jurisdiction may be exercised." Montanans for the Coal Trust,

2000 MT at ¶ 31. For these reasons, the Court should assume original jurisdiction over the Attorney General's Application.

AUTHORITY FOR RELIEF REQUESTED

I. MONTANA'S CONSTITUTION PROVIDES THE ATTORNEY GENERAL WITH THE AUTHORITY TO SERVE AS THE STATE'S CHIEF LEGAL OFFICER WITHOUT INTERFERENCE BY OTHER STATE OFFICIALS.

Montana's Constitution provides that "[t]he attorney general is the legal officer of the state and shall have the duties and powers provided by law." Mont. Const. art. VI, § 4(4). This expression of the Attorney General's duties was an innovation; the 1889 Constitution delegated "no powers or duties specifically" to the Attorney General. State ex rel. Nolan v. District Court, 22 Mont. 25, 27, 55 P. 916 (1899).

The delegates to the Constitutional Convention defined "legal officer of the state" in their reports and debate, making clear the Attorney General's exclusive authority to represent the State in legal actions. Cf. Colorado ex rel. Salazar v. Davidson, 79 P.3d 1221 (Colo. 2003) (holding that Attorney General possessed authority to initiate original proceeding to contest constitutionality of legislative enactment). According to the Executive Committee Report, the Attorney General "prosecutes or defends all litigation in which the state is a party" and "is legal counsel to all state officers and agencies." (Vol. 1 at 442.) In debate, Delegate Joyce emphasized that the Attorney General's duty to "prosecute[] and defend[] all

litigation in which the state is a party" was "in addition to," and not subsumed in, his duties as legal adviser to the Governor. (Verbatim Tr. at 844.) The Report acknowledged some disagreement about the Attorney General's powers relative to the Governor's, but concluded that the Attorney General must retain independent authority to represent the State in legal actions:

> [The Attorney General] is legal adviser to the governor, and here there arises divergence of opinion as to whether he should be appointed by the governor (so as to be fully compatible with his client, so to speak) or be elected by the people (so as to be primarily responsible to them).
>
> The majority of our committee believes he should be in independent status as an elected officer, charged with enforcement of all the law for all the people. Since the governor already has much authority, through the appointing power particularly, we favor having an independent attorney general free to inquire into the faithful performance of duty by any state official or employee. We believe the governor should have the right and opportunity to choose his own legal counsel, but that such counsel should be a part of his official staff rather than the attorney general.

(Exec. Comm. Comments, Vol. 1 at 442.) The minority concurred on this point. (Vol. 1 at 463.)

Though the Executive Committee expected the Governor to choose her own legal counsel, nowhere did the Constitutional Convention contemplate the Governor's legal counsel performing the Attorney General's duty to represent the State in litigation. The Report further clarified the intended relationship between the Attorney General and the Governor in defining the Governor's duties: "Of course, [the governor] is limited in this connection by laws passed by the legislature, and is

further limited by this section from direct responsibility of performing the duties assigned the secretary of state and the attorney general." (Vol. I at 446.)

The Constitutional Convention delegates were well aware of the potential for conflict between the Governor and the Attorney General. In the year preceding the Constitutional Convention, the Attorney General sued the Governor's State Highway Commission over the Commission's authority to hire outside counsel to represent itself in the Commission's name. This Court, noting "the lack of constitutionally enumerated duties of the attorney general" in the 1889 Constitution, held that the Governor "has the power to either direct the attorney general or may himself employ additional counsel." Woodahl v. State Hwy. Comm'n, 155 Mont. 32, 37, 465 P.2d 818 (1970).

Having witnessed this recent dispute over the Attorney General's authority, the delegates repeatedly rejected attempts to subject the Attorney General's legal duties to the Governor's approval. Delegate Cate, noting that then Attorney General Woodahl "has been advocating appointment of the Attorney General" by the Governor, proposed that the Attorney General be appointed rather than elected, because "[t]he Governor should have his own attorney, and it ought to be the Attorney General." (Verbatim Tr. at 867.) The opposing responses sounded a single theme of Attorney General autonomy in representing the State: in a recent school lands dispute "it would have been very unhealthy to have had an appointive Attorney General whose first

allegiance was solely to the Governor, rather than an elective one who represented the interests of the people" (Delegate McNeil at 868); "what we're talking about is creating the relationship between the two most important offices in the whole Executive branch, and in theory and, I think, in practice, they should be kept apart" (Delegate Garlington at 869); "he should be an elected official who is responsible to the people and not subservient to some Governor who has appointed him," (Delegate Wilson at 869-70). The proposal to have the Attorney General serve the Governor rather than the State failed on a voice vote (Verbatim Tr. 870), confirming the broad reading of article VI, section 4(4) as providing for an exclusive duty to prosecute and defend all litigation in which the state is a party.

II. COMMON LAW TRADITION, AMPLIFIED BY MONTANA'S STATUTORY AND CONSTITUTIONAL MANDATE, GRANTS THE ATTORNEY GENERAL THE EXCLUSIVE POWER TO DETERMINE WHETHER LITIGATION SERVES THE PUBLIC INTEREST.

Courts generally have held that in the exercise of his common-law powers, "the attorney general may not only control and manage all litigation in behalf of the state, but he may also intervene in all suits or proceedings which are of concern to the general public." State ex rel. Olsen v. Public Service Comm'n, 129 Mont. 106, 115, 283 P.2d 594 (1955), quoting 5 Am. Jur., § 5 at 235 & § 8 at 238. Obviously there can be no dispute "as to the right of an attorney general to represent the state in all litigation of a public character." Olsen, 129 Mont. at 115. In a case with similar

origins in an out-voted Governor on the Board of Land Commissioners, this Court recognized the common law authority of the Attorney General to sue on behalf of the State with complete independence from the Governor. State ex rel. Jones v. Board of Land Comm'rs, 128 Mont. 462, 279 P.2d 393 (1954), rev'd on federal law grounds sub nom. Montana ex rel. Johnson v. State Board of Land Comm'rs, 348 U.S. 961 (1955).

The Attorney General must put the interests of the public ahead of all other legal interests. "Paramount to all of his duties, of course, is his duty to protect the interest of the general public." Superintendent of Ins. v. Attorney Gen., 558 A.2d 1197, 1202 (Me. 1989). The Attorney General must not yield to the directives of other government agencies or officials if he does not believe those directives to be in the public interest. The Attorney General thus has both the right and the responsibility to promote the interests of all the citizens of the state, not just of certain segments of government. See, e.g., State ex rel. Olsen v. Public Serv. Comm'n, 129 Mont. at 115 (Attorney General represents the public and may bring all proper suits to protect its rights); State ex rel. Allain v. Mississippi-Pub. Serv. Comm'n, 418 So. 2d 779, 782 (Miss. 1982) (the Attorney General's "responsibility is not limited to serving or representing the particular interests of State agencies, including opposing agencies, but embraces serving or representing the broader interests of the State") (citing EPA v. Pollution Control Bd., 372 N.E.2d 50, 52 (Ill. 1977)).

Modern statutes and constitutional provisions reinforce and strengthen this common law concept of the role of the Attorney General, to the point that

> there can be no dispute as to the right of an Attorney General to represent the state in *all* litigation of a public character. The Attorney General represents the public, may bring *all* proper suits to protect its rights, and *he alone* has the right to represent the state as to *all litigation* in which the subject matter is of statewide interest.

7 AM. JUR. 2D *Attorney General* § 14 (citations omitted) (emphasis added).

Moreover, the Attorney General's views in litigation prevail when a conflict arises between his views and those of the state agencies and officers whom the Attorney General represents. Battle v. Anderson, 708 F.2d 1523, 1529 (10th Cir. 1983) (holding that the views of the Oklahoma Attorney General in litigation "must prevail" over the views of the legal counsel for any particular state defendant). The reason for this rule is clear: although the Attorney General is obligated to represent state officials and agencies to the best of his abilities, he need not--indeed, must not--do so at the expense of the people as a whole. Reiter v. Wallgren, 184 P.2d 571, 575 (Wash. 1947) (though Attorney General may represent state officers, "it still remains his paramount duty to protect the interests of the people of the state"). To do so "would be an abdication of official responsibility." Feeney v.

Commonwealth, 366 N.E.2d 1262, 1266 (Mass. 1977) (quoting Secretary of Admin. and Fin. v. Attorney Gen., 326 N.E.2d 334, 338 (Mass. 1975).[1]

Absent a constitutional or statutory limitation, the Attorney General has broad discretion to determine what legal matters fall within the public interest and require his attention. State v. Heath, 806 S.W.2d 535, 537 (Tenn. Ct. App. 1990) (Attorney General "may exercise such authority as the public interest may require" and "has very broad discretion to decide what matters are of public interest and require its attention"). It readily follows that the Attorney General represents the proper party to determine whether and when a given lawsuit serves the public interest. The Attorney General possesses the exclusive and absolute discretion to determine whether and when to initiate a lawsuit in a matter of public interest. State v. Monarch Chemicals Inc., 443 N.Y.S.2d 967, 969 (1981) (affirming Attorney General's common law power to bring action to abate environmental nuisance despite disapproval of state oversight agency); Superintendent of Ins. v. Attorney Gen., 558 A.2d 1197, 1201 (Me. 1989) (holding that Attorney General had standing to seek judicial review under administrative procedures act).

The Attorney General also possesses the exclusive and absolute discretion to set state legal policy and to control all aspects of litigation for and against the State,

[1] See also Ex parte Weaver, 570 So. 2d 675, 684 (Ala. 1990) (upholding Attorney General's authority to dismiss state insurance department proceedings over objection of state insurance commissioner); State ex rel. Derryberry v. Kerr-McGee Corp., 516 P.2d 813, 821 (Okla. 1973) (upholding authority of Attorney General to settle pending litigation).

including whether to initiate or intervene in litigation. Ex parte Weaver, 570 So. 2d 675, 677 (Ala. 1990) ("As the state's chief legal officer, the attorney general has power, both under common law and by statute to make any disposition of the state's litigation that he deems for its best interest. . . . He may abandon, discontinue, dismiss, or compromise it").[2]

III. THE GOVERNOR'S ATTEMPT TO INTERVENE IN THE FIDELITY EXPLORATION LITIGATION EXCEEDS HER AUTHORITY TO ACT ON BEHALF OF THE LAND BOARD.

The Governor's attempt to intervene into the Fidelity Exploration litigation not only exceeds her general authority under the Montana Constitution, but also her specific authority to act on behalf of the State in state lands matters. The Montana Constitution gives only the Board authority "to direct [and] control . . . school lands and lands which have been or may be granted for the support and benefit of the

[2] See also State ex rel. Igoe v. Bradford, 611 S.W.2d 343, 347 (Mo. Ct. App. 1980) ("It is for the attorney general to decide where and how to litigate these issues involving public rights and duties and to prevent injury to the public welfare"); Public Defender Agency v. Superior Court, 534 P.2d 947, 950 (Alaska 1975) (Attorney General possesses "power to make any disposition of the state's litigation which he thinks best"); Perillo v. Dreher, 314 A.2d 74, 79 (N.J. Super. Ct. App. Div. 1974) (recognizing that Attorney General has "the exclusive power to control all litigation to which the State is a party"); Opinion of the Justices, 373 A.2d 647, 649 (N.H. 1977) (Attorney General has "broad authority to manage the state's litigation and to make any disposition of a case which he deems is in the state's best interest"); Michigan State Chiropractic Ass'n v. Kelley, 262 N.W.2d 676, 677 (Mich. App. 1977) (Attorney General "has statutory and common law authority to act on behalf of the people of the State of Michigan in any cause or matter, such authority being liberally construed").

various state educational institutions." Mont. Const., art. X, § 4. Consistent with his general powers to prosecute and defend litigation on behalf of the State, "[a]ll actions . . . affecting any state lands . . . shall be conducted by the attorney general." Mont. Code Ann. § 77-1-111(1). Even before the present Constitution's expansive specification of the Attorney General's powers, this Court recognized the Attorney General's prerogative to prosecute claims on behalf of the Board without deferring to the Governor. See State ex rel. Jones, 128 Mont. 462. Nothing in the Constitution or any statute grants the Governor the authority to act unilaterally on behalf of the State in Board matters.

In fact, as noted by the Court in numerous other circumstances, constitutionally created boards or commissions, such as the Board of Land Commissioners, possess all powers conferred by Montana's Constitution and other branches of government cannot add or detract from those duties. See, e.g., Board of Pub. Educ. v. Judge, 167 Mont. 261, 538 P.2d 11 (1975) (holding unconstitutional the Legislature's attempt to impose a duty of administering vocational education on the Board of Public Education when the Constitution spelled out the Board's duties); Board of Regents v. Judge, 168 Mont. 433, 543 P.2d 1323 (1975) (holding that Legislature's attempt to control privately raised moneys and college president salaries "indicates a complete disregard for the Regents' constitutional power").

IV. THE ATTORNEY GENERAL'S POWERS PURSUANT TO ARTICLE IV, SECTION 4 TRUMP MONT. CODE ANN. § 2-15-201(5) TO THE EXTENT THAT THEY CONFLICT.

The Governor cites Mont. Code Ann. § 2-15-201(5), in support of her direction to the Attorney General to provide assistance to her legal counsel in the Fidelity Exploration litigation. That subsection provides:

> Whenever any suit or legal proceeding is pending against this state or which may affect the title of this state to any property or which may result in any claim against the state, he may direct the attorney general to appear on behalf of the state and may employ such additional counsel as he may judge expedient.

Mont. Code Ann. § 2-15-201(5). This and any other statutory powers given to the Governor to litigate or direct litigation in the State's name must conflict with the Constitution's clear mandate that the Attorney General, and not the Governor, is "the legal officer of the state." Mont. Const. art. VI, § 4(4). The Governor's attempt to prosecute and defend any litigation on behalf of the State clearly exceeds the limitation set in the Constitutional Convention against her assumption of "direct responsibility of performing the duties assigned . . . the attorney general." (Vol. I at 446.)

To the extent it allows the Governor to direct litigation concerning school lands and other state lands under the Board's jurisdiction, § 2-15-201(5) also violates the Constitution's delegation of authority over those lands to the Board itself, and not the Governor alone. See Mont. Const. art. X, § 4. To the same extent, § 2-15-201(5) also conflicts with Mont. Code Ann. § 77-1-111(1) which,

consistent with the Constitution, directs that "[a]ll actions . . . affecting any state lands . . . shall be conducted by the attorney general."

Because § 2-15-201(5) cannot be reconciled with either the Constitution or the State Lands code, this Court should declare it unconstitutional.

CONCLUSION

For the foregoing reasons, the Attorney General respectfully requests that the Court accept original jurisdiction and grant his Application for a Writ of Prohibition and a declaration that § 2-15-201(5) violates article VI, section 4(4) of the Montana Constitution. In the alternative, the Attorney General requests that the Court accept original jurisdiction and set a briefing schedule.

Respectfully submitted this 4th day of November, 2004.

MIKE McGRATH
Montana Attorney General
ANTHONY JOHNSTONE
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: _____
BRIAN M. MORRIS
Solicitor

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Application for Writ of Prohibition to be mailed to:

Mr. James Santoro
Chief Legal Counsel
Office of the Governor
P.O. Box 200801
Helena, MT 59620-0801

Mr. John Metropoulos
Gough, Shanahan, Johnson & Waterman
P.O. Box 1715
Helena, MT 59624-1715

DATED:_____ _____

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this Application for Original Jurisdiction and Writ of Prohibition is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 7,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

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BRIAN M. MORRIS